IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1175

HATZLACHH SUPPLY COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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The Solicitor General's brief in this case remits to secondary status the *ratio decidendi* of the Court of Claims—*i.e.*, that the Tort Claims Act, 28 U.S.C. §2680 (c), bars petitioner's claim. The major portion of the Solicitor General's brief is devoted to the argument that, on the facts of this case, there was no bailment "implied-in-fact" (as contrasted with one "implied-in-law"), so that the contract claim may not be asserted under the

jurisdictional limitations of the Tucker Act. This argument misreads the limitations of the Tucker Act, construes the facts of this case erroneously, and gives an overbroad interpretation to other related statutes on which the Solicitor General relies. In this Reply Brief we deal first with the government's present assertion that no "implied-in-fact" bailment was created and then turn to the issue decided by the court below—the meaning and application of 28 U.S.C. §2680(c).

1. The Solicitor General's first argument is that no bailment was created by the Customs Service's seizure of petitioner's goods because the seizure was not accompanied by any recognition of petitioner's title to the goods. The government argues that the Customs Bureau seized petitioner's goods "under a claim of rightful ownership, in derogation of petitioner's title" (Brief for the United States, p. 20), and thus no bailment relationship could have arisen.

This argument overlooks the realities of seizures of this kind by the Customs Service. Under established procedures formalized in the United States Code and in the Code of Federal Regulations, it was recognized by all parties to the transaction that the seizure of the goods did not formally and irrevocably make them the property of the United States. A meritorious petition for remission—establishing that there had been no willful negligence or intent to defraud—would, in the understanding of all, entitle petitioner to have the seized goods returned upon compliance with a condition such as payment of a penalty. See 29 U.S.C. §1618 and former 19 C.F.R. §§23.23-.25 (1970). Whether title remained formally with the petitioner or was transferred to the United States by the act of seizure was of no practical significance. The well-known practice—understood by all

parties to the transaction—recognized that the goods did not belong irrevocably to the United States to do with them as it wished.

Under the principles defining contracts "implied in fact" articulated by this Court in *Baltimore & Ohio R.R. v. United States,* 261 U.S. 592, 597-599 (1923), and the cases citing that decision, there was "a meeting of minds, which, although not embodied in an express contract, [was] inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." The "tacit understanding" emerging from the governing regulations and procedures was that the seized property was only provisionally in the United States' possession, and that its ultimate disposition depended upon whether a petition for remission or mitigation was filed and how it was acted upon. This conclusion is supported by the Court of Claims' own discussion, in *Hughes Transp., Inc. v. United States,* 121 F. Supp. 212, 222-227 (Ct. Cl. 1954), of the distinction between "implied-in-law" contracts. The Court of Claims there concluded that by excluding from the Tucker Act any "implied-in-law" and "implied-in-fact" contracts, Congress intended to deny recovery for "contracts implied from the unauthorized or tortious acts of the Government's agents" (121 F. Supp. at 225), or for instances where a private party *volunteers* goods or services to the United States (121 F. Supp. at 226), or where the government has clearly announced its intent "*not* to enter into the contract which the courts might have implied as between private parties" (*ibid.*). None of these exceptions applies here. Indeed, the Court of Claims agreed in its opinion that "a strong case" existed for the conclusion that there was "an implied-in-fact contract properly to preserve and redeliver all the goods" (App., p. 30a).

Laying to one side the formalistic question of "title,"[1] there was surely a "tacit understanding," in the present circumstances, that, as of April and May 1970, the United States was merely detaining petitioner's camera supplies until a final determination could be made with regard to them. Hence there was, in this regulatory framework, a bailment relationship "implied in fact."

2. The Solicitor General's second argument appears to be that 28 U.S.C. §2006—a statute enacted originally in 1863 (12 Stat. 741)—provides the exclusive remedy against the United States for the violation of a customs official's duty as a "quasi-bailee" (Brief for the United States, pp. 21-28). The government argues that a customs official is individually liable as a bailee under common-law principles and that this 116-year-old statute specifies the *only* circumstances under which damages of the kind involved here may be recovered against the federal treasury.

The Solicitor General's argument is unsound. Section 2006 of Title 28—which was Section 989 of the Revised Statutes—was designed, as its language plainly indicates, to relieve the personal property of federal officials from levies or attachments which might result from lawsuits brought as a consequence of official acts performed within the scope of their duty. The section declares only that "execution shall not issue" against a federal official, in his individual capacity, in certain enumerated circumstances. Section 2006 does *not* declare that "the United States shall not be liable" for

[1] As this Court observed in *United States v. Stowell*, 133 U.S. 1, 16-17 (1890), even the case of a valid forfeiture "title is not perfected until judicial condemnation . . . ."

certain specified harms. It is neither a statute authorizing actions against the United States in the described circumstances,[2] nor is it a statute barring lawsuits in situations other than those specified in the law.

The appellate decision cited repeatedly by the Solicitor General—*States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974)—supports our reading of this law, not the Solicitor General's. The *States Marine Lines* case concerned a lawsuit brought against federal officials for consequential damages growing out of a customs seizure—precisely the action for which 28 U.S.C. §2680(c) explicitly preserves sovereign immunity. The question in that case was whether the federal officials could be sued as individuals if, as the plaintiff acknowledged, suit against the United States was barred. The Fourth Circuit held that suit *could* be brought against the individuals, even if the ultimate consequence of a favorable judgment would be that the United States would be liable under 28 U.S.C. §2006.

The court of appeals ruled that the Tort Claims Act did not affect the established rule under which collectors of customs could be held individually liable for torts they committed. Thus, 28 U.S.C. §2680 and 28 U.S.C. §2006 were read as totally independent statutory provisions. The court did not suggest, as the Solicitor General appears to do here, that actions against the United States could be maintained *only* if liability is covered by 28 U.S.C. §2006.

3. The Solicitor General also takes refuge in a factual distinction which bears little relation to the petitioner's

[2] To be sure, an effect of the law's enactment was to permit actions to be maintained, as practical matter, against the United States after the requisite certificate of probable cause as filed. *See United States v. Sherman*, 98 U.S. 565 (1879).

theory of liability. The government argues that since the absence of the goods had been noted *before* the Customs Service sent petitioner a notification that the forfeiture would be remitted on payment of a $40,000 penalty, only the goods remaining in the possession of Customs at the time the notice was sent were subject to any bailment obligation. On this account the government maintains that the missing goods were never within any implied contract (Brief for the United States pp. 28-32).

We did not, however, argue that the United States assumed the legal duties of a bailee only *after* sending the notice proposing the payment of the penalty. We argued that the notice (which followed the procedure set forth in the regulations and anticipated by the parties) manifested the state of mind—the "tacit understanding"—with which the goods were initially seized. Thus, the date on which the notice was sent is immaterial; the important fact is that the United States indicated in that notice the capacity in which it had been holding petitioner's imported goods.

4. The Solicitor General's final argument deals with the issue which the Court of Claims held to be dispositive—*i.e.*, whether this lawsuit is barred by 28 U.S.C. §2680(c) (Brief for the United States, pp. 32-40). The Solicitor General apparently does not dispute our contention that an exception from the Tort Claims Act does not act as a limitation upon the Tucker Act (see Brief for Petitioner, pp. 30-34). Rather, the government asserts that the Tucker Act is inapplicable here *only* because there was no contract "implied in fact."

In any event, the Solicitor General's reading of the Tort Claims Act is erroneous. The language of the exception in subsection (c) is, as we have previously noted (Brief for Petitioner, pp. 18-19), markedly more restrictive than the language used in other exceptions. And the government's argument that in enacting subsection (c) Congress meant to preserve, as the exclusive remedy on these facts, the right to sue an individual collector of customs and to recover, in limited circumstances, from the United States under 28 U.S.C. §2006 defies common sense. The overriding purpose of the Tort Claims Act was to enable private citizens to sue the federal government directly for harm caused by federal employees. Neither Judge Holtzoff nor Congress could remotely have believed that a common-law right to sue an individual employee, blanketed within a Civil War provision designed to preserve the assets of such an employee from seizure or attachment, could be described as a situation "for which adequate remedies are already available." *See, e.g.*, H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). And Section 2006 plainly does not fit within future-Judge Holtzoff's description of the "adequate remedies" being preserved. He described these remedies as "various tax laws providing the machinery for recovering any back tax that has been paid but was not properly owing." *Hearings on Tort Claims Against the United States (S. 2690) Before A Subcommittee of the Senate Judiciary Committee*, 76th Cong. 3d Sess. 38 (1940).

CONCLUSION

For the foregoing reasons, as well as those stated in our original brief, the judgment below should be reversed.

Respectfully submitted,

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